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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re A.G., a Person Coming Under the
Juvenile Court Law.

2d Juv. No. B208547
(Super. Ct. No. JV45644)
(San Luis Obispo County)

SAN LUIS OBISPO COUNTY
DEPARTMENT OF SOCIAL SERVICES,

Plaintiff and Respondent,

v.

S.W.,

Defendant and Appellant.

S.W. (mother) appeals from the orders of the juvenile court denying her request for a continuance, denying a modification petition and terminating parental rights to her daughter, A.G. (Welf. & Inst. Code, §§ 388, 366.26, subd. (c)(1).)¹ Mother contends that (1) she was entitled to a continuance of the six-month status review hearing to allow her to offer additional evidence; and (2) the trial court erred by concluding that the parent-child exception to adoption did not apply. Mother acknowledges that her appeal was not timely filed, but argues that

¹ All further statutory references are to the Welfare and Institutions Code.

we should apply the doctrine of constructive filing. We address her argument on the merits, and affirm. The parental rights of the minor's father were terminated in the dependency proceedings, and he is not a party to the appeal.

FACTS

On January 31, 2007, the Department of Social Services (DSS) filed a juvenile dependency petition on behalf of A.G., alleging mother's failure to protect and lack of provision for support. (§ 300, subds. (b) & (g).) Mother was alleged to have a serious substance abuse problem and it was noted that she tested positive for opiates when the minor was born. On January 29, mother was arrested for possession of controlled substances and drug paraphernalia. At the time of her arrest, she admitted to intravenous use of methamphetamine and use of prescription medication. Mother reported that when she uses methamphetamine, she asks her boyfriend, M.W., to babysit the minor.

Mother lived with M.W., who was on probation. He is not the minor's father. Police responded to M.W.'s house to investigate a carjacking. They conducted a probation search that revealed evidence of a counterfeit money operation, large amounts of methamphetamine, as well as cocaine, marijuana, prescription pills, a digital scale and glass methamphetamine pipes.

Twenty-six used hypodermic needles were recovered and two loaded hypodermic needles were found in the bathroom. Methamphetamine and paraphernalia were found on the bathroom sink counter. Evidence of drug sales, including packaging, a scale, pay-owe sheets and multiple cell phones were found. Mother admitted to daily use of methamphetamine and cocaine, intravenous drug use and counterfeiting. The minor, age six months, was taken into protective custody and placed with her maternal grandparents.

The juvenile court ordered the minor detained and set the matter for a contested jurisdiction and disposition hearing. Mother posted bail and was released from custody. On the same day, she was arrested for receiving stolen property, counterfeiting and conspiracy to counterfeit. She again posted bail.

Jurisdiction/Disposition Hearing

Judge Roger Picquet conducted a jurisdiction/disposition hearing on April 14, 2007. The matter was originally set as contested, but the parties submitted on jurisdiction and the matter did not proceed to a hearing.

The jurisdiction/disposition report was prepared on March 14, 2007, when the minor was seven months old. DSS indicated that the maternal grandmother was uncertain about her ability to make a permanent commitment to the minor, and was hoping she could be reunited with mother. The case plan provided that mother was to participate in drug abuse treatment and counseling and to submit to random drug testing. Mother was given supervised visitation.

In an addendum report, prepared May 2, 2007, DSS recommended that family reunification services be offered to mother. An interim review report, dated July 18, indicated that mother had been assessed by Drug and Alcohol Services and they recommended she enter a residential treatment program. She had been placed on a waiting list for a residential treatment center and begun random drug and alcohol testing.

Section 366.21 Six-Month Review Hearing

The six-month review hearing, conducted by assigned Judge Ernie Borunda, was held on October 10, 2007. DSS recommended that reunification services be terminated and the matter set for a section 366.26 hearing. Mother was not present and her counsel and DSS submitted the matter on the reports. The reports reflected that 13 criminal charges against mother were pending and that she had not entered group outpatient treatment or a residential treatment program. DSS concluded that, other than visit her daughter frequently, mother had not complied with her case plan.

Grandmother stated that mother had taken a night job so she could see the minor daily. DSS indicated that mother visits the minor five days a week and spends a great deal of time with her. The social worker reported that mother "is

attentive and loving and is able to take control and meet her daughter's needs." The minor, at age 13 months, was active and developmentally on target.

Despite receiving two letters from DSS regarding her lack of compliance with her case plan, mother had only drug tested once. Mother worked at a Denny's restaurant as a waitress and was living in Santa Maria. Due to her location and pending criminal charges, she was unable to enter a group treatment program in San Luis Obispo County. Mother had been associating with her boyfriend and codefendant, M.W.

The juvenile court found by clear and convincing evidence that mother had not complied with her case plan. It terminated reunification services and set the matter for a section 366.26 hearing.

Mother's Petition for Modification of Court Order

On February 4, 2008, attorney Mark S. Stein substituted in as mother's counsel. On March 10, mother submitted a Request to Change Court Order (JV-80). She requested that the juvenile court vacate its order terminating reunification services and hold another section 366.21 hearing, to allow her to present evidence and cross-examine witnesses. Mother stated that she did not attend the October 2007 hearing because her (former) counsel and the social worker told her it was unnecessary. She claimed that her counsel "conceded" the issue without presenting evidence.

Mother stated in her request she had made great strides in becoming self-supporting and is no longer involved in destructive relationships. She interacts very positively with the minor, whom she visits from 8:00 a.m. to 4:00 p.m. daily. Mother attends narcotics anonymous and alcoholics anonymous meetings "as time allows."

Combined Sections 388 and 366.26 Hearing

The March 13, 2008, hearing was before Judge Roger Randall. Mother's counsel, Stein, moved for a continuance because grandmother was not

present.² Stein indicated to the court that, several days earlier, grandmother had told him she would attend. A short time before the hearing, Stein called her, and she said she could not attend because she could not obtain child care for the minor. Stein stated that grandmother had recently indicated an interest in becoming the minor's legal guardian and should be allowed to testify to that effect.

DSS prepared a report for the section 366.26 hearing, recommending that mother's parental rights be terminated. Mother was awaiting trial on her criminal charges. The report reflected that the minor, then age 18 months, was healthy and developmentally on target. She had just begun preschool and her behavior was appropriate for her age.

The minor appeared comfortable in her grandmother's presence, with whom she had been living for one year. However, grandmother was unwilling to adopt because she was concerned that it would have a negative impact on grandmother's relationship with mother. Grandmother was also concerned that, if she were to die, her husband (the minor's step-grandfather) would be responsible for raising the minor. The social worker recommended that, after the minor is placed in an adoptive home, visitation with grandmother should continue. DSS has approximately 10 potential adoptive families that would be interested in a child of her age and background.

At the hearing, mother testified that she was now living alone and had purchased a car. She has not been employed at Denny's for the last six months, and has instead become self-employed. She supports herself editing wedding photographs and creating advertisements. Mother's counsel argued that it was in the minor's best interest to maintain the existing arrangement - permitting the minor to live with grandmother and allow visitation by mother.

² The motion was originally brought by father's counsel, and mother's counsel joined in the request and argued the motion.

On cross-examination, mother testified that she had not seen a drug and alcohol service counselor since October 2007 and had not drug tested since that time. Although she had been attending 12-step meetings, she had not brought her attendance card with her to court.

Mother admitted to being arrested on new felony drug charges on September 21, 2007. She posted bail on September 22, and was arraigned on October 11, and remanded to jail. She posted additional bail and was again released on October 19. Mother conceded that there were times over the past year when she was in jail and had court appearances, so did not visit the minor. The court denied the section 388 petition, finding that it was not in the minor's best interest to modify its prior orders.

The court also denied mother's motion to continue the hearing so grandmother could testify. It indicated that, if "the maternal grandmother[] wants to change the position she's taken in accordance with the reports, she should be here to explain that. I do notice that the reports indicate she's very conflicted because she wants to maintain a loving relationship with her daughter as well as her grand child."

The court proceeded on the section 366.26 matter. The adoptions social worker, Anne Sederberg, testified that, in January 2008, she suggested to grandmother that mother's visitation be decreased because the minor was adoptable. Mother now sees the minor only once a week, at the direction of DSS. Sederberg testified that she had discussed guardianship and adoption with grandmother numerous times, both in person and by telephone, but grandmother was not interested.

The juvenile court found that the parental benefit exception did not apply. It stated that mother clearly loved the minor, but did not participate in "the health and rearing decisions, she's really more in the position of an older sister or aunt to the child." The court found by clear and convincing evidence that the

minor as likely to be adopted, terminated parental rights and set the matter for a post-permanency hearing.

Mother's Attempts to Appeal Termination of Parental Rights

On March 19, 2008, six days after the hearing, mother was arrested and incarcerated. On April 10, attorney Stein was arrested and incarcerated. On May 28, the San Luis Obispo Superior Court received a letter from mother indicating that she wished to appeal the judgment terminating her parental rights. Mother's May 28 letter arrived at the superior court 15 days after the time for filing a notice of appeal had expired. In her letter, mother indicated that she was incarcerated and her retained counsel was in custody in Ventura County jail. After conferring with this Court, the superior court accepted the letter for filing on June 9.

Mother filed a petition for a writ of habeas corpus on September 18, 2008, requesting that we construe her appeal as timely filed.³ We deferred ruling on the writ pending disposition of the instant appeal. We granted her request for judicial notice of the record in the writ proceeding.

DISCUSSION

Appealability

In her writ petition, mother requested that we apply the doctrine of constructive filing. The doctrine permits, in criminal cases, the filing of a late notice of appeal where the defendant has been diligent in his efforts to appeal. (*In re Benoit* (1973) 10 Cal.3d 72, 86, 89.) Courts have declined to extend the doctrine of constructive filing to appeals of orders terminating parental rights. (*In re Alyssa H.* (1994) 22 Cal.App.4th 1249, 1254; *In re Ricky H.* (1992) 10 Cal.App.4th 552,

³ In a declaration attached to her writ petition, mother alleged that she twice asked Stein to appeal the judgment. On April 19, 2008, she mailed a letter to the juvenile court informing it that she wished to appeal the judgment terminating parental rights. The letter was returned to her in jail. On May 5, 2008, she again sent the letter to the juvenile court, to the attention of the presiding judge. That letter was also returned.

560; *In re Isaac J.* (1992) 4 Cal.App.4th 525, 531-532; *In re A.M.* (1989) 216 Cal.App.3d 319, 322.)

The rationale is that the special need for finality in parental termination cases and the danger of imperiling adoption proceedings prevail over the policy considerations in favor of constructive filing. (*In re A.M.*, *supra*, 216 Cal.App.3d at p. 322.) The court in *In re Ricky H.*, rejected the doctrine on the additional ground that the mother was not incarcerated, thus not entitled to relief under *Benoit* or its progeny. (*In re Ricky H.*, *supra*, 10 Cal.App.4th at p. 560.) Here, however, mother had been arraigned on criminal charges and was awaiting trial. Both she and her counsel were incarcerated. She had made a number of unsuccessful attempts to appeal within the statutory time period. Under these circumstances, we will apply the doctrine of constructive filing and consider her appeal on the merits.

Section 388 Petition and Denial of Continuance

Under section 388, a juvenile court is authorized to modify a prior order if a petitioning parent shows a change of circumstances or new evidence and establishes that modification is in the best interests of the child. (§ 388, subd. (c); *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Eric E.* (2006) 137 Cal.App.4th 252, 260.) The court has broad discretion in resolving a petition to modify a prior order. Its determination will not be disturbed on appeal unless an abuse of discretion is clearly shown. (*In re Stephanie M.*, *supra*, at p. 318.) "It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child. [Citation.]" (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.)

To support her request to change the court order, mother asserted that she was now self-employed, had secured housing, owned a car, and had attended 12-step meetings. She claimed that these were changed circumstances warranting a change in the juvenile court's order terminating reunification services. Mother's counsel made two arguments at the hearing: (1) that offering additional

reunification services would be in the minor's best interest; and (2) that the court should grant a continuance to allow him to obtain grandmother's testimony.

In determining the best interests of the child, the juvenile court shall consider the reason for the dependency, the reason the problem was not overcome, the strength of the parent-child and child-caretaker bonds, the length of time the child has been a dependent, the nature of the change of circumstance, the ease by which the change could be achieved, and the reason it was not made sooner. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446-447.) The court considered these factors and found that mother had not shown that her request was in the minor's best interests.

We also observe that mother had not demonstrated a change in circumstances warranting that she receive additional reunification services or that she was entitled to a new hearing. Mother did not have stable employment, had not shown progress in a substance abuse treatment program, has pending felony charges and has not shown an ability to address the problems that lead to removal.

Mother's request for a continuance was also properly denied. A juvenile court may continue a hearing provided that it is not contrary to the minor's interest. (§ 352, subd. (a).) A continuance will be granted only upon a showing of good cause. (*Ibid.*) "In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements." (*Ibid.*)

Mother's counsel argued that the minor had been in grandmother's care for the majority of her life, thus a brief continuance would not have harmed the minor's interest in a prompt resolution of her custody status. He argues on appeal that a continuance was necessary to determine whether the relative/caretaker exception to adoption applied. (§ 366.26, subd. (c)(1)(A).)

We review a request for a continuance for an abuse of discretion. (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 585; *In re Ninfa S.* (1998) 62 Cal.App.4th

808, 811.) Grandmother had consistently expressed a lack of interest in guardianship or adoption. She was informed of the section 366.26 hearing and told mother's counsel that she would make an appearance. However, she did not, ostensibly because she could not obtain childcare. If grandmother had been interested in the proceedings, she would have appeared. There was no showing of good cause to justify a continuance. The juvenile court did not abuse its discretion in denying the continuance request.

Parental Relationship Exception to Adoption

Mother contends that the juvenile court lacked substantial evidence to support its finding that the parental relationship exception does not apply. Section 366.26, subdivision (c)(1) requires the juvenile court to terminate parental rights if it finds by clear and convincing evidence that a child is likely to be adopted. However, a court may choose not to terminate rights if it finds, under an enumerated exception, "a compelling reason for determining that termination would be detrimental to the child" (*Id.*, subd. (c)(1)(B).) One such exception applies when there exists a beneficial parent relationship. This exception requires a showing of "regular visitation and contact with the child and [that] the child would benefit from continuing the relationship." (*Id.*, subd. (c)(1)(B)(i); *In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

"To meet the burden of proof, the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits. [Citation.]" (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.) There must be proof of "a parental relationship," not merely a relationship that is "beneficial to some degree but does not meet the child's need for a parent." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) The existence of a beneficial relationship is determined by the age of the child, the portion of the child's life spent in parental custody, the quality of interaction between parent and child, and the child's particular needs. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 689.)

Courts are divided as to the standard of review to be applied to a finding on the parental relationship exception. Most have applied a substantial evidence standard, which asks whether there is any substantial evidence, contradicted or otherwise, supporting the juvenile court's finding. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) Others have reviewed the finding for an abuse of discretion. (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1351.)

Under either standard, the juvenile court's finding is proper because the minor was just six months of age when she was placed in grandmother's care. At the time of the section 366.26 hearing, she had been out of mother's care for a full year. Although mother's visits were frequent, and the minor displayed a bond, it was grandmother who made the health and child rearing decisions. The court noted that mother's role was similar to that of an older sister or aunt. The juvenile court did not err in finding that the parental relationship exception did not apply.

The judgment (orders denying a continuance and section 388 petition and terminating parental rights) is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Roger Picquet, Judge
Ernie Borunda, Judge*
Roger Randall, Judge
Superior Court County of San Luis Obispo

Joseph T. Tavano, under appointment by the Court of Appeal, for
Defendant and Appellant.

Warren R. Jensen, County Counsel, Leslie H. Kraut, Deputy County
Counsel for Plaintiff and Respondent.

*(Retired judge of the San Diego Sup. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)